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NO. 91-543

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK,
Petitioner,

v.

THE UNITED STATES OF AMERICA, et al.,
Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,
Intervenors.

AMICUS BRIEF IN SUPPORT OF PETITIONER NEW YORK FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS BRIEF OF THE STATES OF OHIO, ALABAMA, ALASKA, ARIZONA, GUAM, ILLINOIS, INDIANA, MAINE, NEBRASKA, NEW JERSEY, PENNSYLVANIA, RHODE ISLAND AND SOUTH DAKOTA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

INTRODUCTION 3

I. The Second Circuit's Decision Improperly Expands The Scope Of Commerce Power Recognized By This Court By Allowing Congress To Compel A State To Become A Market Participant 7

II. The Second Circuit's Decision Ignores The Principle Set Forth In *Gregory v. Ashcroft* That The Tenth Amendment Reserves To The States, And The Guarantee Clause Guarantees Them, "Authority That Lies At The Heart Of Representative Government," Which Includes The Power To Decide Whether And When To Pass And Execute Laws To Establish The State As A Provider Of Waste Management Services 8

III. The Take Title Provision - Described By Its Author As "Punitive" - Constitutes A Taking Of State Property For Which The Federal Government Does Not Provide Just Compensation In Violation Of The Fifth Amendment 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Duke Power Co. v. Carolina Environmental Study Group, Inc., 483 U.S. 59 (1978) 13

Duquesne Light Co. v. Barasch, 109 S.Ct. 609 (1989) 11

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982) 10

Gregory v. Ashcroft, 11 S.Ct. 2395 (1991) ..... *passim*

Loretta v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 11

Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Com'n., 461 U.S. 190 (1983) 14

Preseault v. Interstate Commerce Commission, 110 S.Ct. 914 (1990) 13

Reeves, Inc. v. Stake, 447 U.S. 429 7

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 11

Tobin v. United States, 306 F.2d 270 (D.C. Cir. 1962), *cert. den.*, 371 U.S. 902 (1962) 12

United States v. Colgate & Co., 250 U.S. 300 (1919) 7

United States v. 50 Acres of Land, 469 U.S. 24 (1984) 11

CASES

United States v. Fuller, 409 U.S. 488 11

CONSTITUTION

U.S. Const. Amdt. 5 ..... *passim*

U.S. Const., Art. I, Section 8 7

U.S. Const., Art. IV, Section 4 ..... 2, 8

STATUTES

42 U.S.C. 2021b to 2021j ..... *passim*

42 U.S.C. 2021c(a)(1) 6

42 U.S.C. 2021e(d)(2)(C) ..... *passim*

42 U.S.C. 10222(a)(1) 13

Low-Level Radioactive Waste Policy Act of 1980, P.L. 96-513, 94 Stat. 3347 4

Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, P.L. 99-240, 99 Stat. 1859 12

OTHER AUTHORITIES

131 Cong. Rec. H13077 (remarks of Rep. Markey) 6

131 Cong. Rec. S18113 (remarks of Sen. Johnston) 6, 13

131 Cong. Rec. S18114 (remarks of Sen. McClure) 6

131 Cong. Rec. S18118 (remarks of Sen. McClure) 6

TABLE OF AUTHORITIES *cont.*

OTHER AUTHORITIES

131 Cong. Rec. S18252
(remarks of Sen. Simpson) 11, 12

Black's Law Dictionary (6th ed. 1990) 7

Congressional Research Service, *Constitutional Issues Raised By the Imposition of Liabilities on the States Under A Proposed Amendment to the Low-Level Radioactive Waste Policy Act of 1980,* Memo to House Committee on Energy and Commerce, December 16, 1985 6

H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 1 at 14, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2974 4

Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century,* 88 Colum. L. Rev. 1 (1988) 2, 8, 10

National Governors' Association, *Low-Level Waste: A Program for Action, Final Report of the National Governors' Association Task Force on Low-Level Radioactive Waste Disposal* (1980) 4

U.S. Congress Office of Technology Assessment, *Managing Commercial High-Level Radioactive Waste (April, 1982)* *14*

Written Testimony of James O. Payne, Jr., Hearing Before the Subcommittee On Energy and the Environment, House Committee on Interior and Insular Affairs, on H.R. 645, Radiation Protection Act of 1991 14

STATEMENT OF INTEREST

Amici have a manifest interest in questions that lie at the core of state sovereignty interests. *Amici* believe the decision below is a precedent that profoundly impacts the nature of federal - state relations. As explained below, the decision of the Second Circuit sanctions a statute that exceeds congressional power violates the Tenth Amendment, Guarantee Clause and Takings Clause and shifts substantial liabilities from Congress, and from an industry it has traditionally protected, onto States. *Amici* include States that have entered into compacts under the Low Level Radioactive Waste Policy Amendments Act of 1985, as well as unaligned States such as Petitioner New York. The provision affects compact States and unaligned States alike. *Amici* accordingly submit this brief to assist the Court in the resolution of the States' rights issues in this case.

SUMMARY OF ARGUMENT

The Take Title Provision[1] involved in this case should be held unconstitutional because it tramples on state sovereignty by putting state legislative and executive branches squarely under the thumb of Congress.

The Take Title Provision compels a State, on and after January 1, 1996, to take title to, possession of and liability for low-level radioactive waste generated within its borders upon request by the generator, unless the State has developed or secured access to a disposal facility to serve generators. This statute will force States to take waste not only from commercial generators, but also from some of the Federal Government's generators.

In addition to the reasons put forth by the State of New York in its Petition for a Writ of Certiorari, *amici* offer the following four (4) grounds which warrant consideration of

[1] Section 5(d)(2)(C) of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("the 1985 Act"), 42 U.S.C. 2021e(d)(2)(c).

this case by the Court.

First, the provision is "punitive" - in the words of its author - and constitutes a taking of state property for which the Federal Government does not provide just compensation.

Second, the decision below improperly expands the scope of commerce power recognized by this Court by upholding a provision that effectively compels a State to engage in commercial activity, regardless of whether the State desires or is ready to do so. The Take Title Provision improperly crosses the line between encouraging and compelling a State to undertake sovereign action to engage in a field of commerce. The provision is therefore beyond congressional power.

Third, the decision below ignores the teachings of *Gregory v. Ashcroft*, 11 S.Ct. 2395 (1991), that the Tenth Amendment reserves to the States, and the Guarantee Clause guarantees them, "authority that lies at the heart of representative government," which includes the power to decide whether and when to pass and to execute laws to establish a State as a provider of waste management serves. The Guarantee Clause guarantees to the States a "Republican Form of Government", U.S. Const., Art. IV, Section 4, which is one in which "the people control their rulers." Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23 (1988).

The Take Title Provision, however, is more "intrusive on state sovereignty" - according to the Congressional Research Service - than any other statute reviewed by a court. The compulsory nature of the provision compels state legislatures and executives to make and implement decisions at the beckoning of the Federal Government.

The Take Title Provision has the effect of depriving citizens of control over their state government. It has the effect of compelling a State to rearrange its legislative agenda and to pass laws to establish a means for the State to collect, to transport, to treat, to store and/or to dispose of waste.

It has the effect of compelling a State to use its executive powers to implement such laws, and its judicial powers to resolve disputes. The provision displaces citizen control over how States disburse state-generated tax funds. States are accountable not to their citizens, but to Congress.

The decision below sets a precedent for congressional acts compelling a State to provide not only waste disposal services, but also power generation, hospitals or other services which Congress may feel are inadequately served by the free market. The decision also frustrates state innovation such as encouraging the development of private nuclear waste disposal utilities.

The fourth reason the Court should review this controversy now is that the provision threatens serious disruption to the stability of compacts, inasmuch as its legislative history suggests congressional consent to the compacts is conditioned on States strictly complying with the provision. While States are generally progressing with the development of disposal facilities, it is anticipated that not all States will be able to develop or to obtain access to a disposal facility by 1996. A self-executing termination of consent would be highly disruptive to compacts under the 1985 Act.

In sum, the Take Title Provision exceeds congressional power, tramples on state sovereignty and constitutes a taking of state property for which the federal government has not provided compensation. Because the decision of the Court of Appeals for the Second Circuit upholds the Take Title Provision, *amici* respectfully request that the Court grant New York's Petition for a Writ of Certiorari.

ARGUMENT

INTRODUCTION

In 1980 the National Governors' Association's Task Force on Low-Level Radioactive Waste, acting in response to a perceived national shortage of disposal facilities for low-level radioactive waste, recommended that "[e]ach state accept primary responsibility for the safe disposal of low-

level radioactive waste generated within its borders, except for waste generated at federal government facilities."[2] The NGA Task Force Report recommended the formation of interstate compacts to develop regional facilities. Congress adopted the NGA Task Force Report recommendations in the Low-Level Radioactive Waste Policy Act of 1980 ("1980 Act"), P.L. 96-513, 94 Stat. 3347, except the 1980 Act also declared a policy of States having responsibility for some of the Federal Government's waste.

The 1980 Act declared that "[i]t is the policy of the Federal Government that - (A) each State is responsible for providing for the availability of capacity . . . for the disposal of low-level radioactive waste generated within its borders," including some waste generated by the Federal Government. P.L. 96-573, 94 Stat. 3348. The 1980 Act encouraged the development of regional disposal facilities under interstate compacts and allowed such compacts to exclude out-of-state waste after January 1, 1986, provided the compact obtained congressional consent. Thus, after January 1, 1986, compacts which included the States of South Carolina, Nevada and Washington, where the nation's only disposal facilities were located, could exclude out-of-compact waste from these facilities once they obtained congressional consent.

In 1984 Representative Udall distributed to the States draft amendments to the 1980 Act which attempted to give more assurance that States would develop disposal facilities. A working group under the National Governors' Association developed an "unofficial counter-proposal" that served as a basis for the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("1985 Act"), 42 U.S.C. 2021b to 2021j. H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 1 at 14, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2974, 2976.

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[2] National Governors' Association, *Low-Level Waste: A Program for Action, Final Report of the National Governors' Association Task Force on Low-Level Radioactive Waste Disposal* 6 (1980) ("NGA Task Force Report").

The 1985 Act imposes a schedule for the development of disposal facilities. Generators within States not meeting the schedule face denial of access to the three (3) existing facilities and or imposition of surcharges on their disposal fees. The 1985 Act also prevents the States of South Carolina, Nevada and Washington from interfering with out-of-state access to the private facilities in their States until January 1, 1993, when the 1985 Act allows their compacts to close their compact borders.

However, Congress added the Take Title Provision to the 1985 Act in the final hours of the legislative session without the same involvement of the National Governors' Association. The Take Title Provision provides as follows:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. 2021e(d)(2)(c).[3]

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[3] This *amicus* brief takes no position on whether the Take Title Provision applies to South Carolina, Washington and Nevada, all of which have intervened in this case in support of the United States, or whether that provision applies to any State in a compact with the intervening States. Nothing in this *amicus* brief is intended to affect a State in a compact with the intervening States regarding applicability of the Take Title Provision.

The author of the Take Title Provision described it as "a very far reaching, difficult, and punitive provision." 131 Cong. Rec. S18113 (remarks of Sen. Johnston). Senator McClure, chair of a committee having jurisdiction over the legislation, doubted its constitutionality. *Id.*, at S18114, S18118. Representative Markey concluded the provision "may not pass a constitutional challenge." *Id.*, at H13077. A Congressional Research Service analysis requested by Representative Markey concluded that the provision is unprecedented and raises "constitutional issues" under the Tenth Amendment. *Id.* The analysis found that "[t]here does not appear to be pertinent judicial precedent that has upheld in the face of 10th Amendment objections a federal mandate as intrusive on state sovereignty as the [federal compulsion] at issue here." *Constitutional Issues Raised By the Imposition of Liabilities on the States Under A Proposed Amendment to the Low-Level Radioactive Waste Policy Act of 1980,* Memo from Congressional Research Service to House Committee on Energy and Commerce, December 16, 1985, page CRS-5.[4]

While States are generally progressing with development of disposal facilities, it is anticipated that not all States will be able to develop or obtain access to a disposal facility by 1996. The Take Title Provision is a strict liability statute that harms States.

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[4] The 1985 Act has a second provision that presents constitutional concerns. Title 42 U.S.C. Section 2021c(a)(1) provides that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States," for the disposal of three (3) classes of low-level radioactive waste generated within the State by private and some Federal Government generators. See page 3 of New York's Petition for a Writ of Certiorari.

To the extent, if any, that this provision may be construed as establishing a cause of action for failure of a State, including any State not subject to the Take Title Provision, to comply with this provision, it also unconstitutionally infringes on state sovereignty in the manner described herein for the Take Title Provision.

I. The Second Circuit's Decision Improperly Expands The Scope Of Commerce Power Recognized By This Court By Allowing Congress To Compel A State To Become A Market Participant.

As the State of New York has argued in its petition to the Court, the Take Title Provision imposes an unprecedented mandate upon the States, compelling them to exercise their sovereign powers to implement a federal regulatory scheme. In addition, the provision imposes a more particular burden on the States, compelling them to participate in a market of commerce, regardless of whether they desire or are prepared to do so.

The Commerce Clause provides that "Congress shall have Power . . . to regulate Commerce . . . among the several States . . . . " U.S. Const., Art. I, Section 8. Neither the text of the clause nor precedent from this Court allow Congress to compel a State to become a market participant, regardless of whether the State desires or is ready to do so. Thus, Congress lacks power to impose this kind of liability on States.

The power to regulate commerce presupposes the existence of a voluntary participant in commerce. Nowhere in the phrase "to regulate commerce" can there be found authority for compelling a person or State to engage in commerce as a market participant, even if the State desired or was ready to do so. Commerce by definition is a voluntary activity. "Commerce" means the "exchange of goods, productions or property of any kind; the buying, selling, and exchanging of articles." Black's Law Dictionary 269 (6th ed. 1990). Exchanging, buying and selling are all voluntary activities.

The Court has found "no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves, Inc. v. Stake,* 447 U.S. 429, 437 (1980). Moreover, the Court continues to support "the long recognized right of trader or manufacturer, engaged in an

entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.*, at 439, quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).[5] The power to decide *with whom* to deal is meaningless unless it also includes the power to decide *whether* and *when* to deal.

The Court should grant *certiorari* because the decision below improperly expands the scope of congressional commerce regulation recognized by this Court. The provision is beyond congressional power. It encourages Congress to believe it can compel States to provide not only waste disposal facilities, but also hospitals, power plants and whatever other services Congress may feel are lacking in the marketplace.

II. The Second Circuit's Decision Ignores The Principle Set Forth By This Court In *Gregory v. Ashcroft* That The Tenth Amendment Reserves To The States, And The Guarantee Clause Guarantees Them, "Authority That Lies At The Heart Of Representative Government," Which Includes The Power To Decide Whether And When To Pass And Execute Laws To Establish The State As a Provider Of Waste Management Services.

The Guarantee Clause of the U.S. Constitution ensures that citizens have proper control over their state governments. That clause provides that "the United States shall guarantee to every State in this Union a Republican Form of Government . . . " U.S. Const., Art. IV, Section 4. "Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their rulers." Merritt, *The Guarantee Clause*

[5] This *amicus* brief takes no position on whether a State not belonging to a compact may exclude out-of-state low-level radioactive waste under *Reeves, supra*. Nothing in this *amicus* brief is intended to affect any State in taking a position for or against such exclusion.

and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 23 (1988).

In *Gregory v. Ashcroft*, ____ U.S. ____ , 111 S. Ct. 2395 (1991), the Court recently invoked the plain statement rule, a rule of statutory interpretation, to avoid a "potential constitutional problem" presented by a requested application of the Federal Age Discrimination in Employment Act of 1967 (ADEA) to preempt a mandatory retirement provision for judges in a state constitution. The Court reviewed its precedents and concluded that the Guarantee Clause is a shield against congressional intrusion on state authorities at the heart of representative government:

> These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. *It is an authority that lies at " 'the heart of representative government.' "* It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantees to every State in this Union a Republican Form of Government."

Id (citations omitted) (emphasis added).

Thus, the Court narrowly construed the ADEA and upheld the state mandatory retirement provision.

The lower court's decision ignores the teachings of *Ashcroft* that the Guarantee Clause is a shield against congressional infringement on the authority of a State to make decisions that lie "at the heart of representative government." *Id.*[6] The heart of state representative government includes the power to set a legislative agenda and to decide whether and when to pass laws, no less when

[6] *Ashcroft* was decided after oral argument of this case in the Second Circuit.

the State is to decide whether or when to become a market participant. The decision below, however, renders the Guarantee Clause powerless to prevent Congress from forcing States to become agents of the federal government.

The compulsory nature of the Take Title Provision deprives citizens of control over state government. The provision has the effect of compelling a State to alter its legislative agenda and to pass laws to establish a means for the State to collect, to transport, to treat, to store and or to dispose of waste. It has the effect of compelling a State to use its executive powers to implement such laws, and its judicial powers to resolve disputes. It displaces citizen control over how States disburse state-generated tax funds. States are accountable not to their citizens, but to Congress.

The Tenth Amendment, however, reserves to the States and the Guarantee Clause guarantees them the power to decide whether and when to pass and to execute laws to provide waste management services as a market participant. These decisions lie "at the heart of representative government." *Ashcroft, supra.* "Federal attempts to appropriate state governmental resources [to force implementation of federal policies] deny the states a republican form of government." Merritt, 88 Colum. L. Rev., at 61.

The Court "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Federal Energy Regulatory Commission v. Mississippi,* 456 U.S. 742, 761-762 (1982). The Court should grant *certiorari* because the decision below improperly goes a giant step further, contrary to *Ashcroft,* in that it upholds a statute compelling a State to promulgate and execute laws establishing the State as a provider of waste services.

III. The Take Title Provision - Described By Its Author As "Punitive " - Constitutes A Taking Of State Property For Which The Federal Government Does Not Provide Just Compensation In Violation Of The Fifth Amendment.[7]

The Takings Clause of the Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. States have a right to just compensation for a federal taking of state property as the term "private property" includes property of State and local governments. *United States v. 50 Acres of Land,* 469 U.S. 24, 31. The constitutional requirement of just compensation derives its content from basic equitable principles of fairness. *United States v. Fuller,* 409 U.S. 488, 490.

A permanent physical occupation of real property is a *per se* taking. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 434 (1982). The Takings Clause protects not only real property but also personal property and intangible property rights. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1003 (1984) (right to trade secrets protected). The Court has found that inadequate compensation of a public utility under a rate statute may be a taking. See *Duquesne Light Co. v. Barasch,* 109 S.Ct. 609, 616 (1989).

The Take Title Provision mandates a taking of state property. The requirement that a State take possession of waste may mean that the State must employ its vehicles to pick up and transport the waste and its facilities to store and or dispose of the waste. Such a forced use of state vehicles is a taking of state personal property. *Ruckelshaus, supra.* Such a permanent, forced possession of state property to store and or dispose of waste is a *per se* taking of state real property.[8] *Loretto, supra.* A taking also occurs when

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[7] Pennsylvania does not join Section III.

[8] This controversy should be heard now for the additional reason that the Take Title Provision, if left to stand, risks serious disruption to the compact system under the 1985 Act. A failure of a compact State to

the provision transfers title to the State. The provision forces on a State an undesirable, burdensome property interest.

The Take Title Provision violates the Takings Clause by mandating a taking of state property without just compensation by the Federal Government. The provision expressly places on a State liability:

> for all damages directly or indirectly incurred by [a] generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator notifies the State that the waste is available for shipment.

42 U.S.C. 2021e(d)(2)(C). Thus, by the terms of the statute, Congress mandated that States have liability for any failure to take possession.

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[8] *Footnote 8 cont.*
comply with the Take Title Provision, for whatever reason, risks a self-executing termination of congressional consent to its compact. Congress' consent to compacts has been "subject to" the 1985 Act. See Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, P.L. 99-240, 99 Stat. 1859 (passed concurrent with 1985 Act.) "[T]he failure to comply voluntarily with the requirement that title and possession be taken - one of the principal conditions of consent to any regional compact - means that the entire compact in which such State is a member will be null and void, invalid, and cannot be implemented." 131 Cong. Rec. S18252 (remarks of Sen. Simpson). The legislative history indicates an expressed intent to preclude States from challenging the constitutionality of the provision as a defense to an enforcement action.

Termination of consent would be highly disruptive to the compact system under the 1985 Act. See *Tobin v. United States*, 306 F.2d 270, 272-273 (D.C. Cir. 1962), *cert. den.*, 371 U.S. 902 (1962) ("suspicion of even potential impermanency would be damaging to the very concept of interstate compacts"). Congressional consent expressly allows compacts to exclude out-of-compact waste, which is a centerpiece of the 1985 Act. The Take Title Provision, if left to stand, risks serious disruption to the compact system under the 1985 Act.

The structure of the 1985 Act also shows that Congress mandated that States assume the full burden of the Take Title Provision. The provision is a deadline to compel state development of disposal facilities. Requiring States to take title to, possession of, and liability for waste as of January 1, 1996 is consistent with the plan of the 1985 Act that States have disposal facilities available by then.

Moreover, the legislative history expressly shows that Congress intended States to assume all obligations and liabilities under the provision. According to its author, the provision "insures that the State will not be able to avoid the financial consequences of failure to provide adequately for the disposal" of private, state and some federal waste. 131 Cong. Rec. S18113 (remarks of Sen. Johnston). "It is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that." *Id.*

In light of the language of Take Title Provision, the structure of the 1985 Act and the legislative history, it is inconceivable that Congress intended to have the federal government reimburse the States for takings under the provision. There is an unambiguous intention to shift federal and private liabilities to the States. See *Preseault v. Interstate Commerce Commission*, 110 S.Ct. 914, 922 (1990) (inquiry is whether Congress exhibited "unambiguous intention to withdraw Tucker Act remedy" for compensating takings). Thus, the Take Title Provision violates the Fifth Amendment requirement to provide States with just compensation for takings of state property.

The Take Title Provision is particularly inequitable when compared to congressional mandates to the federal government. 42 U.S.C. 10222(a)(1) (Department of Energy required to take generator's high-level radioactive waste only after DOE facility is available). Moreover, Congress imposes this burden on a State to assist a federally - promoted industry. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63 (1978) (Atomic Energy Act "encouraged the private sector to become involved in the development of atomic energy for peaceful purposes"). The

duty is imposed in an area where the Court has found little state regulatory authority. *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Com'n.*, 461 U.S. 190 (1983). Some States have called on Congress to expressly give States greater authority in low-level radioactive waste management, particularly in light of the burdens of 1985 Act, and such authority has not been given. See, *e.g., Written Testimony of James O. Payne, Jr.*, Hearing Before the Subcommittee On Energy and the Environment, House Committee on Interior and Insular Affairs, on H.R. 645, Radiation Protection Act of 1991. It is imposed in an area where the federal government itself has encountered difficulties in waste management. See *Managing Commercial High-Level Radioactive Waste, U.S. Congress Office of Technology Assessment (April, 1982) p. 10 ("The greatest single obstacle* that a successful waste management program must overcome *is the severe erosion of public confidence in the Federal Government* that past problems have created") (emphasis in original).

Thus, the Court should grant *certiorari* because the decision below allows Congress to shift liabilities from itself, and from an industry it has traditionally protected, onto States in violation of the Takings Clause.

CONCLUSION

Amici respectfully request that the Court grant New York's Petition for a Writ of Certiorari.

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